IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC 85765
	)	
MICHAEL CRAWFORD,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION TWELVE
THE HONORABLE STEVEN H. GOLDMAN, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

Amy M. Bartholow, MOBar #47077
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3724
Telephone (573) 882-9855
FAX (573) 875-2594
ABarthol@mspd.state.mo.us

INDEX

TABLE OF AUTHORITIES

Page

***CASES*:**

***CONSTITUTIONAL PROVISIONS*:**

***STATUTES*:**

MISSOURI COURT RULES:

LEGAL TREATISES:

OTHER AUTHORITIES:

JURISDICTIONAL STATEMENT

A St. Louis County jury found Mr. Michael Crawford, appellant, guilty of first degree murder, Section 565.020[1]; first degree assault, Section 565.050; and two counts of armed criminal action, Section 571.015. The Honorable Steven H. Goldman sentenced Mr. Crawford to life imprisonment without parole and three consecutive thirty year sentences. After the Eastern District Court of Appeals affirmed Mr. Crawford's convictions, this Court granted his transfer application pursuant to Rule 83.04, and it has jurisdiction over this cause pursuant to Article V, Section 10, Mo. Const. (as amended 1976).

[1] All statutory citation are to RSMo 2000.

STATEMENT OF FACTS

On the afternoon of October 23, 2000, Dion Butler and Roland Morgan drove to an auto parts store near the intersection of Jennings Road and Lewis & Clark Boulevard in St. Louis to buy a new battery for Butler's truck (TR 18, 268-270). Twelve-year-old Harold Anderson accompanied them (TR 18, 270, 346-348). Harold always "watched his back" when he went anywhere with Dion, because he knew that Dion had killed somebody (TR 367-368).

While they were under the hood installing the battery, a green car drove in and parked on the far side of the parking lot (TR 288, 350). The passenger got out, walked across the lot to Dion's truck, raised his shirt and pulled out a gun (TR 351-352). Harold turned and yelled, "this man got a gun." (TR 19, 352). Dion and Roland turned around and Harold began to run (TR 352). Then Dion and Roland began to run (TR 352). The man with the gun shot at Dion and Roland as they were running (TR 353, 368). He did not shoot at Harold (TR 368).

After the shooting, Harold saw the shooter run back to the green car and the car drive away (TR 353-357). Dion died at the scene and Roland sustained multiple gunshot wounds, but survived (TR 392, 628-629, 567-569).

At the time of the shooting, Beverly Williams was driving home from work; she stopped at the traffic light at this same intersection (TR 384-386). She noticed two men and a young child working on a car near the auto parts store (TR 386). Shortly thereafter, she heard gunshots from the parking lot (TR 386). She saw the shooter for a matter of seconds because the entire incident was over in seconds (TR 301-302). She did not

notice the shooter's eyes, nose or mouth (TR 300, 401). She did notice the shape of his head and his blue shirt[2] (TR 300-301, 636).

The police arrived quickly and Officer Kardasz placed Harold and Ms. Williams into his police car (TR 17, 302, 394). He wanted to take them to the police station to question them about the incident (TR 302, 394). On the way to the station, the police radio broadcast information that a gun had been located in a residential front yard (TR 302). Officer Kardasz took Harold and Ms. Williams to see the gun (TR 303). Then, as they started back towards the station, a second radio broadcast indicated that the getaway car had been found (TR 303). Ms. Williams heard, "they've spotted the car." (TR 303). They drove to that location to identify the car (TR 21, 303, 635-636).[3] Ms. Williams said that Officer Kardasz told her that a blue shirt was found in the car (TR 313).

After viewing the car, a third call came over the police radio indicating that two suspects had been found (TR 20, 35, 303). Ms. Williams testified that Officer Kardasz told her "on the side of the road they have two men and one of them has a bald head." (TR 409-410). Officer Kardasz drove Harold and Ms. Williams to the location of the suspects for a roadside "show-up." (TR 22, 35). From 100 feet away, Harold and Ms. Williams viewed the two suspects from inside the police car, behind "dark tinted windows." (TR 22). Neither suspect was wearing a blue shirt (TR 31-32).

---

[2] Harold said it was a green shirt, but he was not sure (TR 271).

[3] The car was later found to belong to Tamika Beverly, Robert Reece's girlfriend (TR 562, 638). Reece had borrowed Tamika's car on October 23, 2000 (TR 562).

The two men on the side of the road were Robert Reece and Appellant, Mr. Crawford (TR 436-437). Mr. Crawford and Mr. Reece look a lot alike, except Reece is heavier (TR 369, 741-742, 744-745). They are cousins (TR 369).

Officer Kardasz asked Harold which man was the shooter (TR 276). Harold was not able to identify either of the men as the shooter (TR 22, 28, 33, 70, 370, 633). When Harold told the officer that he could not make an identification, he did not think the officer was very happy (TR 379). He agreed that the officers told him that these are the guys that did it and they wanted an identification (TR 372-373). Harold thought that the short, chubby one might have been the shooter, but the other guy was too thin to be the shooter (TR 292). The chubby one was Reece and the thinner one was Mr. Crawford (TR 292-293). He was not sure though who the shooter was and he did not make a positive identification (TR 293).

Ms. Williams, who was sitting next to Harold in the police car, thought that one of their heads looked like the shooter's head, but she could not say about the face (TR 303). She picked out one man by the shape of his head (TR 304). She was "pretty certain" about this man, although, she thought that the shooter was heavier (TR 34). Officer Kardasz discussed it with her (TR 34). After their discussion, Ms. Williams concluded that maybe the man looked heavier because he had been wearing the blue shirt over the T-shirt (TR 34).

One week after the shooting, the Prosecuting Attorney still did not think that there was enough evidence to issue charges against Mr. Crawford (TR 651-652). So, on October 30, 2000, Officer Kardasz went to talk to Harold about his statement (TR 645).

At this time, Harold allegedly told Officer Kardasz that the more he thought about the incident, the more he was sure that the man with the bald head or close haircut that he had seen down on Hall Street was the shooter (TR 645-646, 674). It is unclear from Officer Kardasz' testimony which man that was-- Reece or Crawford (TR 645-646).

The State then filed a first degree murder charge against Mr. Crawford on November 1, 2000 (LF 1, 7, 669). The next day, the State amended the felony complaint to add a first degree assault charge and two counts of armed criminal action (LF 1, 8-10).

Mr. Crawford was arrested on the warrant and appeared before the Court on these charges on November 2, 2000 (LF 1). Pursuant to Rules 22.07(b) and 31.02(a), the judge fulfilled his "duty…to advise [Mr. Crawford] of his right to counsel, and of the willingness of the court to appoint counsel to represent him if he is unable to employ counsel." (Appendix A-1; Supp. LF 1). The court document prepared by the trial court contemporaneously with this initial appearance is entitled "Proceedings in a Criminal Case (Arraignment)" (Appendix A-1; Supp. LF 1).

Two days after Mr. Crawford's arraignment on the Complaint, the police brought Harold and Ms. Williams to the St. Louis County jail to view a live lineup (TR 61, 665, 669, 773).[4] Mr. Crawford was the only one in the lineup that Harold and Ms. Williams

[4] At trial, the prosecutor asked the trial court "to take judicial notice of the fact that the charges were filed November 1st, 2000, which was three days before the lineup" (TR 669). The Court agreed to take judicial notice of that fact (TR 669).

had seen before (TR 71). The police did not put the other suspect, Mr. Crawford's cousin Robert Reece, in the lineup (TR 90, 376, 414, 664).

Mr. Crawford's attorney told Officer Sheehan a few days before the lineup that if the police were going to do a live lineup, they should notify the attorney first (TR 73). After the lineup had already started, Officer Sheehan called Mr. Crawford's attorney to let him know that the lineup was in progress; however, by the time the attorney walked from his office across the street to the police station, the lineup was over (TR 72-73). Officer Sheehan saw the attorney walking into the jail immediately after the lineup was over, and told him that both witnesses had identified Mr. Crawford (TR 72).

The lineup was held in a utility room at the St. Louis County holdover facility (TR 61). It was a temporary set-up because the area was under construction (TR 61, 317). Standing in a dark hallway, the witnesses looked through a piece of cardboard into the utility room as five men walked into the room (TR 61-62). Both Harold and Ms. Williams stood in the hallway at the same time (TR 61-62). Harold agreed that he and Ms. Williams were close enough that they could touch (TR 289). Ms. Williams said that Harold was standing out of her reach, but not out of sight (TR 413).

Harold was brought to the window first (TR 289).[5] As the men walked into the room, Harold said, "no, no, no, no, yes." (TR 24, 290). Officer Kardasz recalled Harold

[5] Ms. Williams disputed this and testified that she viewed the lineup first (TR 316). This contradicts both Harold's testimony and that of the officers who were present at the lineup (TR 373, 574, 659).

saying aloud, “no, that’s not him, that’s not him, that’s not him,” and then when Mr. Crawford walked out, he said, “that’s him.” (TR 24, 659, 661). Harold was saying this in the presence of Ms. Williams, as she was watching him pick someone out of the lineup (TR 416, 662-663). Later, as they left the lineup, Harold said to Ms. Williams, “it was the last guy, right?” (TR 84).

When Ms. Williams walked up to the door to look at the lineup, she recognized a bald man with the cone-shaped head (TR 399). She picked out Mr. Crawford (TR 400). Ms. Williams identified Mr. Crawford by the “shape of the head” that she had identified before (TR 306). At Mr. Crawford’s trial, when Ms. Williams viewed a picture of Mr. Reece, she also recognized “the shape of the head.” (TR 304). She described Mr. Reece’s head as “slightly pointed.” (TR 419). She asked the prosecutor who it was (TR 304). She said that Mr. Reece’s head is also “slightly coned,” but not quite as defined as the other one (TR 313). She testified, “Please understand me. I did not see any eyes, nose or mouth. I only recognize the shape of the head.” (TR 319).

Mr. Crawford’s attorney moved to suppress both the in-court and out-of-court identifications due to the suggestiveness surrounding the identifications which gave rise to the likelihood of irreparable misidentification (LF 22-23). At the suppression hearing, the prosecutor showed Mr. Reece’s photograph to Harold and asked him if that was the shooter; Harold looked at Reece’s picture for thirty seconds and then said he was “not for sure.” (TR 277-279). He then identified a picture of Mr. Crawford and said he was the shooter (TR 280).

One year after the incident, the prosecutor's investigator contacted Darrin Mosley, who had allegedly witnessed the shooting while sitting at the stoplight at the intersection (TR 688-689). On the day of the shooting, Mr. Mosley told the police that the shooter was a short, thick, pot-bellied man with a low haircut (TR 706-707, 727). But no one was in contact with Mr. Mosley for an entire year (TR 727-728).

Mr. Mosley said that the getaway car was a blue Mustang[6] (TR 690). The investigator showed Mr. Mosley a photo lineup and, after about fifteen seconds, he put his finger on Mr. Crawford's photograph and said, "this one looks familiar." (TR 693, 728-729). This was the first time he had ever seen pictures of suspects (TR 716). Then he said "Yeah, this looks like him here" (TR 729). He was "80 percent" sure of his identification (TR 710, 717, 729). After he gave his identification, he asked the investigator if he picked out the right guy (TR 733).

The investigator did not show Mr. Mosley any pictures of Robert Reece (TR 716-717, 726). The investigator agreed that if Mr. Mosley had seen a picture of Reese and picked Reese out as the shooter, it would have had a negative impact on the State's case against Mr. Crawford (TR 735-736). At trial, the prosecutor showed Mr. Mosley a picture of Mr. Reece, but Mosley said he had never seen him before, even though Mr. Mosley had previously testified against Reece at Reece's trial (TR 696-697). The investigator came to Mr. Mosley's house two or three times "to make sure that this was the same person that [he] felt that [he] picked the first time." (TR 718). At Mr.

[6] The other witnesses said that it was a green Grand Am (TR 270, 300, 350, 389).

Crawford's trial, the investigator agreed that Mr. Mosley's identification was not the strongest he had ever seen (TR 730).

Also at trial, the investigator testified that when a witness cannot identify a suspect in a show-up, and then the same suspect is placed in a lineup for the witness to view, that there could be an impermissibly suggestive effect on the witness, especially if the suspect is the only one from the show-up who later is placed in the lineup (TR 747).

The jury retired to deliberate at 3:15 p.m. on Thursday, September 26, 2002 (TR 795). At 7:00 p.m., the jury sent a note asking if they could go home (TR 800). One of the jurors was sick (TR 801). The court released the jury at 7:16 p.m. and told them to return at 9:00 the next morning (TR 802).

In the next morning's paper, the St. Louis Post-Dispatch published an article about Mr. Crawford's case (TR 802). It included information that the co-defendant Reece had been tried and acquitted (TR 802). It also included information that Reece claimed that he never got out of the car, did not know what happened, and drove away when Crawford jumped back in (TR 802). It continued that Mr. Crawford told Reece as they were running away that he had shot Butler (TR 802).

Pursuant to defense counsel's request, the court addressed the jury about the article (TR 802). The court first reminded the jury that it had admonished them not to read any newspaper reports about the trial; then the court asked if any of them had seen the newspaper article in the morning paper (TR 804). All of the jurors shook their heads no (TR 804). No further inquiry was made (TR 804).

At 12:30 p.m., the jury returned guilty verdicts on all counts (TR 804-807, LF 54-57). On October 25, 2002, the trial court sentenced Mr. Crawford to life imprisonment without parole for first degree murder and three consecutive thirty year sentences for first degree assault and two corresponding counts of armed criminal action (TR 812, LF 61-65).

Mr. Crawford appealed his convictions to the Eastern District Court of Appeals. That Court affirmed Mr. Crawford's convictions, ruling, in part, that an initial appearance before a judge – the arraignment on the Complaint – does not amount to a "meaningful stage" in the proceedings such that the right to counsel would attach at that time (Memorandum opinion at 3-4). Therefore, it found that Mr. Crawford's Sixth Amendment rights had not attached before the live lineup was conducted two days later. The Eastern District did recognize that a live lineup occurring after the right to counsel has attached is a "critical stage" of the proceedings, requiring the presence of counsel (Mem. Opinion at 3).

This Court granted Mr. Crawford's transfer application to address the question of whether Missouri will follow *Brewer v. Williams*, 430 U.S. 387 (1977), which held that adversary judicial proceedings had been initiated when "[a] warrant had been issued for [Williams] arrest, he had been arraigned on that warrant before a judge in a Davenport courtroom, and he had been committed by the court to confinement in jail." *Id.* at 399, 97 S.Ct. at 1239-40, 51 L.Ed.2d at 436.

POINTS RELIED ON

I.

The trial court plainly erred in overruling Mr. Crawford's motion to suppress identification and in 1) allowing Harold Anderson, Beverly Williams, Officer Sheehan and Officer Kardasz to testify about the pretrial lineup identifications; and 2) allowing Harold and Ms. Williams to identify Mr. Crawford in court as the shooter, because this evidence was obtained in violation of Mr. Crawford's right to counsel guaranteed by the 6th and 14th Amendments to the U.S. Constitution, Art. I, § 18(a) of the Missouri Constitution, and Rules 22.07 and 31.02, in that the uncounseled lineup, wherein Harold and Ms. Williams identified Mr. Crawford, took place on November 4, 2000, two days "after the time that adversary judicial proceedings had been initiated against him" and his right to counsel had attached. Not only was Mr. Crawford entitled to his counsel's presence at this "critical stage," but counsel had advised the police not to conduct any lineups in his absence. Nonetheless, the police contacted Mr. Crawford's attorney only after the lineup was a fait d'accompli. Evidence regarding the lineup is excludable *per se* because "[o]nly a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." The trial court was on notice that a constitutional violation had occurred because, upon the prosecutor's request, it took judicial notice of the fact that the uncounseled lineup occurred two days after the arraignment, and manifest injustice will result if this error goes uncorrected.

Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977);

Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967);

U.S. v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967);

Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972);

U.S. Const., Amends 6 & 14;

Mo. Const., Art. I, Section 18(a);

Rules 22.01, 22.07, 31.02 & 30.20; and

Rule 29.01 (1967)

II.

The trial court abused its discretion in overruling Mr. Crawford's motion to suppress Harold Anderson and Beverly Williams' identification of him as the shooter, and admitting these identifications at trial, because admission of these identifications violated Mr. Crawford's right to due process of law guaranteed by the 5th and 14th Amendments to the U.S. Const. and Art. I, § 10 of the Mo. Const., in that the identifications were the result of an unnecessarily suggestive police procedure which created a substantial risk of misidentification, and as the crux of the State's case rested on identification testimony alone, the admission of the evidence was not harmless.

Foster v. California, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969);

Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401(1972);

Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977);

State v. Moore, 726 S.W.2d 410 (Mo. App., E.D. 1987);

U.S. Const., Amends 5 & 14; and

Mo. Const., Art. I, Section 10.

III.

The trial court plainly erred in failing to conduct individual questioning of the deliberating, unsequestered jurors *sua sponte*, in violation of Mr. Crawford's rights to due process and a fair trial before a fair and impartial jury as guaranteed by the 5th, 6th and 14th Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that when it came to the trial court's attention that a highly prejudicial newspaper article about Mr. Crawford's trial was published in the morning paper, after the unsequestered, but deliberating jury, had gone home for the evening, it was not enough to remind the jury that the court had previously instructed them not to look at the newspaper and then to ask one general question about whether any of them had seen the morning paper. Failure to conduct individual questioning of each juror resulted in manifest injustice if this error is left uncorrected.

Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959)

Patterson v. Colorado, 205 U.S. 454, 27 S.Ct. 556, 51 L.Ed. 879 (1907);

United States v. Brantley, 733 F.2d 1429 (11th Cir. 1984);

United States v. Herring, 568 F.2d 1099 (5th Cir. 1978);

U.S. Const., Amends 5, 6, & 14;

Mo. Const., Art. I, Sections 10 & 18(a); and

Rule 30.20.

ARGUMENT

I.

The trial court plainly erred in overruling Mr. Crawford's motion to suppress identification and in 1) allowing Harold Anderson, Beverly Williams, Officer Sheehan and Officer Kardasz to testify about the pretrial lineup identifications; and 2) allowing Harold and Ms. Williams to identify Mr. Crawford in court as the shooter, because this evidence was obtained in violation of Mr. Crawford's right to counsel guaranteed by the 6th and 14th Amendments to the U.S. Constitution, Art. I, § 18(a) of the Missouri Constitution, and Rules 22.07 and 31.02, in that the uncounseled lineup, wherein Harold and Ms. Williams identified Mr. Crawford, took place on November 4, 2000, two days "after the time that adversary judicial proceedings had been initiated against him" and his right to counsel had attached. Not only was Mr. Crawford entitled to his counsel's presence at this "critical stage," but counsel had advised the police not to conduct any lineups in his absence. Nonetheless, the police contacted Mr. Crawford's attorney only after the lineup was a fait d'accompli. Evidence regarding the lineup is excludable *per se* because "[o]nly a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." The trial court was on notice that a constitutional violation had occurred because, upon the prosecutor's request, it took judicial notice of the fact that the uncounseled lineup occurred two days after the arraignment, and manifest injustice will result if this error goes uncorrected.

Alleged eyewitness identifications comprised the key evidence against Mr. Crawford. There was no confession, and no physical evidence tying him to the murder weapon. But the identification evidence was illegally obtained in violation of Mr. Crawford's Sixth Amendment right to counsel, and should have been excluded from trial. The identifications were made during an uncounseled live lineup, two days *after* the initiation of adversary proceedings and the attachment of Mr. Crawford's right to counsel.

A live identification lineup constitutes a "critical stage" of the criminal pretrial proceedings. ***Gilbert v. California*, 388 U.S. 263, 272, 87 S.Ct. 1951, 1956, 18 L.Ed.2d 1178 (1967); *United States v. Wade*, 388 U.S. 218, 236-237, 87 S.Ct. 1926, 1937, 18 L.Ed.2d 1149 (1967)**. Mr. Crawford was placed in such a lineup on November 4, 2000. If adversary proceedings were initiated before then, Mr. Crawford was entitled to the presence of his counsel at this lineup because the Sixth Amendment right exists at critical stages "at or after the initiation of adversary proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." ***Kirby v. Illinois*, 406 U.S. 682, 689, 92 S.Ct. 1877, 1882, 32 L.Ed.2d 411 (1972)**. The question here is whether the November 2, 2000, arraignment[7] initiated adversary proceedings.

[7] St. Louis County used "arraignment" to describe the appearance on November 2, 2000 (Appendix A-1). Mr. Crawford does not allege that he was entitled to counsel at this arraignment. The question of whether the arraignment initiated adversary proceedings is distinct from the question whether the arraignment itself is a "critical stage" requiring the presence of counsel. ***Michigan v. Jackson*, 475 U.S. 625, 630 (1986)**.

Timeline

The facts necessary to resolve this claim of error are straightforward:

Oct. 23, 2000	Crime committed; Mr. Crawford arrested (TR 16, 60).
Oct. 24-30, 2000	For a week after the shooting, the Prosecuting Attorney did not believe he had enough evidence to issue charges; investigation continued (TR 651-652).
Nov. 1, 2000	Complaint filed charging Mr. Crawford with first degree murder, and warrant issued (LF 1, 7).
Nov. 2, 2000	Amended complaint filed adding charges of first degree assault and armed criminal action (LF 1, 8-10).
Nov. 2, 2000	Mr. Crawford's first appearance in court. St. Louis County called this an "arraignment" (Appendix A-1). Charges were read and Mr. Crawford was advised of his right to counsel. Bond was denied and Mr. Crawford returned to jail.
Nov. 4, 2000	Police conducted a live lineup in the absence of Mr. Crawford's counsel, wherein Harold Anderson and Beverly Williams viewed Mr. Crawford. (TR 45, 72-73, 61, 641, 665).
Aug. 23, 2002	Suppression hearing: Officer agreed that he was on notice to call defense counsel before conducting lineup, but admitted that lineup took place without counsel.

	After the lineup was over, officer told counsel that both witnesses picked Mr. Crawford (TR 72-73).
Sept. 25, 2002	At trial, the prosecutor asked the trial court "to take judicial notice of the fact that these charges were filed November 1st, 2000, which was three days before the lineup." The trial court takes judicial notice (TR 669).

Preservation

While Mr. Crawford's counsel failed to specifically move to suppress the identification testimony on the additional basis of this Sixth Amendment violation, all of the evidence necessary to prove the violation was presented to the court. The court was on notice that a Sixth Amendment violation had occurred. In fact, the prosecutor himself asked the court to take judicial notice of the fact that the charges against Mr. Crawford were filed three days *before* the lineup, and an officer testified that the lineup was conducted *without* counsel (TR 72-73, 669).

Although Mr. Crawford must ask this Court for plain error review under Rule 30.20, the constitutional violation here facially establishes substantial grounds for believing that a miscarriage of justice has occurred. ***See State v. Twitty,* 793 S.W.2d 561, 564 (Mo. App., E.D. 1990)** (Defendant claimed he was denied the right to counsel at a pretrial lineup. Although not raised in the motion to suppress identification, the Court reviewed for plain error.) The plain error rule is, after all, intended to be the ultimate repository of an appellate court's power to correct injustice. ***State v. Jordan,* 627 S.W.2d 290, 293 (Mo. banc 1982)**.

The Law of Attachment

The right to counsel, guaranteed by the Sixth and Fourteenth Amendments, is indispensable to the fair administration of our adversary system of criminal justice. ***Brewer v. Williams*, 430 U.S. 387, 398, 97 S.Ct. 1232, 1239, 51 L.Ed.2d 424 (1977)**. The vital need for counsel at the pretrial stage is succinctly explained in ***Powell v. Alabama*, 287 U.S. 45, 57, 53 S.Ct. 55, 59, 77 L.Ed. 158 (1932)**:

> (D)uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.

After "adversary judicial proceedings" have been initiated and the right to counsel has attached, a pretrial lineup at which the accused is exhibited to identifying witnesses constitutes "a critical stage of the criminal prosecution." ***Gilbert v. California*, 388 U.S. at 272**. Thus, both Mr. Crawford and his counsel should have been notified of the impending lineup, and counsel's presence should have been a prerequisite to conducting the lineup. ***United States v. Wade*, 388 U.S. at 236-237**. The presence of counsel at the lineup can often avert prejudice and assure a meaningful confrontation at trial. ***Id.*** Put another way, counsel can hardly impede legitimate law enforcement; on the contrary, law enforcement may be assisted by preventing the infiltration of taint in the prosecution's identification

evidence. ***Id.*** That result cannot help the guilty avoid conviction but can only help assure that the right man has been brought to justice. ***Id.***

The initiation of "adversary judicial proceedings" referenced in ***Gilbert*** and ***Wade*** occurs by way of formal charge, preliminary hearing, indictment, information, or arraignment. ***Brewer v. Williams*****, 430 U.S. at 398 (quoting *Kirby v. Illinois*, 406 U.S. 682, 689, 92 S.Ct. 1877, 1882, 32 L.Ed.2d 411 (1972)**; ***United States v. Gouveia*****, 467 U.S. 180, 187-188, 104 S.Ct. 2292, 2297, 81 L.Ed.2d 146 (1984).** In ***Kirby,*** the United States Supreme Court described the initiation of judicial criminal proceedings:

> [It] is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable.

Kirby v. Illinois**, 406 U.S. at 689-690**. We know in Mr. Crawford's case that the government had not yet committed itself to prosecute during the week following the shooting. The prosecutor told Officer Kardasz that he did not have enough evidence to bring charges, and Officer Kardasz continued his investigation (TR 651-652). But on November 1, 2000, the government did commit to prosecuting

Mr. Crawford, and it did so by filing a Complaint and obtaining a warrant for Mr. Crawford's arrest (LF 7). The next day when it filed an Amended Complaint, it committed itself to prosecute Mr. Crawford on three additional charges as well (LF 8-10). Mr. Crawford was arrested on the warrant and brought to Court for his first appearance on these charges on November 2, 2000 (Appendix A-1). The charges were read to him, he was advised of his right to counsel, he was denied bond and returned to jail (LF 1). These circumstances marked the beginning of "adversary judicial proceedings" against Mr. Crawford, just as they did against Robert Williams in ***Brewer v. Williams, supra***.

Case Study – Brewer v. Williams

Based on an investigation into the disappearance of a young girl in Des Moines, Iowa, a warrant was issued for Robert Williams' arrest on a charge of abduction. ***Brewer v. Williams*, 430 U.S. at 390**. Williams turned himself into police in Davenport, Iowa, roughly 160 miles from Des Moines. ***Id.*** Shortly thereafter, Williams was arraigned before a judge in Davenport on the outstanding arrest warrant. The judge advised him of his right to counsel and committed him to jail. ***Id.* at 391**. Williams was then released to the custody of Des Moines officers to be returned to Des Moines, during which car ride he was subjected to the infamous "Christian burial speech" interrogation. ***Id.* at 391-393**.

Every Iowa court that reviewed the case found that Williams' Sixth Amendment rights had attached prior to the interrogation when he was arraigned on the warrant in the Davenport courtroom. ***Id.* at 400, fn 7**. In Iowa, a criminal proceeding is commenced "by the filing of a complaint before a magistrate." **Iowa Code § 804.1 (1985)**; ***State v.***

***Jackson*, 380 N.W.2d 420, 423 (Iowa 1986)**. The actual prosecution of an indictable offense formally commences with the filing of a trial information or indictment. **Iowa R.Crim.P. 4(2)**. Nevertheless, the Sixth Amendment right to counsel attaches upon the filing of a complaint by the county attorney followed by the issuance of a warrant and the arrest of defendant. This is because the significant level of prosecutorial involvement shows the arrest could not be characterized as "purely investigatory in nature." ***Jackson*, 380 N.W.2d at 423 (*quoting State v. Johnson*, 318 N.W.2d 417, 435 (Iowa 1982))**. The Iowa courts' analysis regarding the attachment of the Sixth Amendment right to counsel came directly from the United States Supreme Court's instruction that "adversary proceedings" commence when the forces of the State have solidified in a position adverse to the defendant. ***Kirby*, 406 U.S. at 689**. The courts found that the filing of a Complaint and the issuance of a warrant for Williams' arrest, followed by his arraignment on that warrant, clearly established the initiation of adversary proceedings.

The United States Supreme Court agreed. In ***Brewer v. Williams***, the important question for review was not whether the right to counsel had attached, but rather, whether it had been waived. ***Id.* 430 U.S. at 388**. The Court stated:

> *There can be no doubt* in the present case *that judicial proceedings had been initiated* against Williams before the start of the automobile ride from Davenport to Des Moines. A warrant had been issued for his arrest, he had been arraigned on that warrant before a judge in a Davenport courtroom, and he had been committed by the court to confinement in jail.

***Id.* at 399** (emphasis added). The Court's words were strong and unambiguous – Williams' Sixth Amendment right to counsel had attached, and the interrogation without counsel violated this right:

> [S]o clear a violation of the Sixth and Fourteenth Amendments as here occurred cannot be condoned. The pressures on state executive and judicial officers charged with the administration of the criminal law are great…[b]ut it is precisely the predictability of those pressures that makes imperative a resolute loyalty to the guarantees that the Constitution extends to us all.

Id.* at 406**. But the finding of attachment was not merely tangential to the Court's opinion, even though it was uncontested. It is important to remember that the lower court opinion on review in ***Brewer v. Williams had reversed Williams' conviction on three separate grounds: 1) that Williams had been denied his Sixth Amendment right to the assistance of counsel under ***Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964)**; (2) that he had been denied the constitutional protections defined in ***Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694**; and 3) that in any event, his self- incriminatory statements on the automobile trip from Davenport to Des Moines had been involuntarily made. ***Brewer v. Williams*, 430 U.S. at 395**. Prior to ***Brewer v. Williams***, it was possible to read the Sixth Amendment cases as saying that the right to counsel "attached" only upon the filing of an indictment or information. Williams, however, had not been indicted like Massiah clearly had been. ***See Brewer v. Williams***, 430 U.S. at 400. So, the Court needed to extend the ***Gilbert*** and ***Wade*** line of

cases to make the Sixth Amendment applicable to Williams' case. By agreeing with the Iowa courts' analysis, that attachment occurred at the arraignment on the warrant, the Court plainly provided the necessary extension in the language quoted above: "There can be no doubt… that judicial proceedings had been initiated against Williams."

Initial Appearance

The fact that Williams had been "arraigned" did not mean that Williams had been required to enter a plea. Rather, under Iowa law, it meant only that there had been an initial appearance before a judge. Missouri procedure is no different. In fact, St. Louis County described the initial appearance before the judge as an "arraignment" even though Mr. Crawford was not asked to plead at that time (Appendix A-1).

The use of the word "arraignment" in United States Supreme Court precedent actually refers to what most states designate as an "initial appearance." ***Owen v. State,* 596 So.2d 985, 989 (Fla.,1992) (*citing* 1 Wayne R. LaFave & Jerome H. Israel, n. 6, § 1.4, at 21 (1984)**). "The term 'arraign' simply means to be called before a court officer and charged with a crime. ***Id.*** The term commonly has two uses. ***Id.*** First, it is used in the general sense to refer to the proceeding where an accused (who is now formally a defendant) is first taken to court and presented before a committing magistrate. ***Id.*** The magistrate will confirm that the defendant is the person named in the formal complaint and will read aloud the charges contained in it. ***Id.*** The magistrate will generally warn the defendant that he has the right to remain silent, that anything he says will be used against him, and that he has a right to a lawyer's help, either retained or appointed. ***Id.*** No responsive pleading is made. ***Id.*** The magistrate will then set bail. ***Id.*** This

proceeding is commonly called a 'first appearance,' 'initial presentment,' or 'arraignment on the warrant.' ***Id.***

Second, the term 'arraignment' can also refer to the step in the prosecution where the defendant is brought before the trial court--not the committing magistrate-- informed of the charges against him, and required to enter a plea. ***Id.*** This proceeding is commonly called an 'arraignment on the information or indictment.' ***Id.*** When the Court in ***Kirby v. Illinois, supra,*** and ***Michigan v. Jackson*****, 475 U.S. 625 (1986)[8], s**aid that the Sixth Amendment right to counsel attaches at 'arraignment,' it apparently was using the term in the first sense." ***Owen*****, 596 So.2d at 989, n.7**.

The Eastern District's opinion in Mr. Crawford's case recited the *second* definition of arraignment noted above, but it ignored the first definition (Slip op. at 4). Some legal dictionaries list both. *See* **Barron's Law Dictionary, 29 (3rd ed. 1991)** ("Arraignment" is an initial step in the criminal process wherein the defendant is formally charged with an offense, i.e., given a copy of the complaint or other accusatory instrument, and informed of his constitutional rights (e.g., to plead not guilty, be indicted, have a jury

---

[8] Respondent Jackson and his companion Respondent Bladel were "arraigned" on warrants, just like Mr. Crawford. ***Michigan v. Jackson***, 475 U.S. at 630. The Court rejected the State of Michigan's assertion that this type of arraignment did not suffice to attach the Sixth Amendment right to counsel, stating, "[i]n view of the clear language in our decisions about the significance of arraignment, the State's argument is untenable." *Id.* (*citing* ***Brewer, supra***.)

trial, appointed counsel if indigent, etc.). Where the appearance is shortly after the arrest it may properly be called a "presentment" *since no plea is taken*, at least not if it is a felony charge. If it is called an arraignment, it is termed an "Arraignment on the Warrant [or on the complaint.]) Regardless of whether Missouri calls this an "initial appearance" or an "arraignment on the warrant/complaint," the process constitutes the initiation of adversary judicial proceedings, because at that point in time, the forces of the State have solidified in a position adverse to the defendant. ***Kirby*, 406 U.S. at 689**.

Many courts and legal scholars agree with this view. Recently, in ***Manning v. Bowersox*, 310 F.3d 571, 575 (8th Cir. 2002)**, the Eighth Circuit rejected the same argument that the State attempts to make in Mr. Crawford's case. In ***Manning***, the State of Missouri argued that Manning's Sixth Amendment right to counsel had not attached at the time he was questioned by a police informant because Manning had only been charged by complaint, rather than by indictment. ***Id.*** The Eighth Circuit disagreed. It held, instead, that "the right to counsel attaches to interrogations conducted after the initiation of adversarial criminal proceedings against the defendant; it is of no import whether the proceedings were initiated by complaint or indictment." ***Id.*** *See also* **2 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 11.2, at 8 (Supp.1991)** ('[T]he initiation of adversary judicial proceedings ordinarily requires a formal commitment of the government to prosecute, as evidenced by the filing of charges. *This can occur prior to the issuance of an indictment or information, as where the defendant is brought before the magistrate for an "**arraignment" or "first appearance"** on charges filed in the form of a complaint.*'); **Joseph D. Grano, *Kirby, Biggers, and Ash: Do Any***

***Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 Mich. L.Rev. 717, 788-79 (1973)** ('[A] convincing argument can be made that a criminal prosecution commences at least with the preliminary arraignment when a formal complaint is filed in court against the accused.... Professor Miller, supporting his exhaustive analysis of the charging function with extensive field study data, has called the decision to file a complaint "the heart of the charging process." ... *It would defy common sense* to say that a criminal prosecution has not commenced against a defendant who, perhaps incarcerated and unable to afford judicially imposed bail, awaits preliminary examination on the authority of a charging document filed by the prosecutor, less typically by the police, and approved by a court of law.'); **Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court,* 75 Mich. L.Rev. 1320, 1368-69 n. 226 (1977)** ('Even though a complaint has been filed in the process of obtaining a warrant, adversary judicial criminal proceedings may be viewed as being initiated only after the accused is brought before a magistrate on that complaint.... This starting point would make sense from an administrative standpoint because counsel for the indigent defendant ordinarily would not be appointed until the defendant has appeared before the magistrate.')

In addition to the Eighth Circuit, other jurisdictions also have held that an "initial appearance" constitutes the initiation of adversary judicial proceedings. *See, e.g,.* ***State v. Tucker*, 414 S.E.2d 548, 560 (N.C. 1992)** (the Sixth Amendment right to counsel attached during Tucker's *initial appearance*, because at that point the State's position against him had solidified with respect to the charge of murder); ***Ault v. State,* 2003 WL**

22508502, 5 (Fla., Nov. 6, 2003) (an accused's request for counsel at the *initial appearance* on a charged offense, is effective to invoke the Sixth Amendment right to counsel); ***United States v. Edwards*, 342 F.3d 168 (2d Cir.2003)** (the Court considered on the merits a Sixth Amendment challenge to the admission of statements made after an "arraignment" by which the Court clearly means an *initial appearance* before a magistrate); ***United States. v. Hudson*, 267 F.Supp.2d 818, 820 (S.D. Ohio, 2003)** (criminal proceedings against Defendant had been initiated at Defendant's *initial appearance*, therefore, his Sixth Amendment right to counsel had attached); ***United States v. Rodriguez*, 888 F.2d 519 (7th Cir.1989)** (held that statements made by a criminal defendant during an interrogation, after an attorney had been appointed for him at his *initial appearance* before a magistrate judge, were inadmissible); ***Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 892-893 (3rd Cir. 1999)** (Matteo's right to counsel attached at the time he underwent a preliminary arraignment on the arrest warrant, and the police agents were well aware of his legal representation).

Missouri Procedure

In Missouri, **Rule 22.01** provides: "Felony proceedings may be initiated by complaint filed in any court having original jurisdiction to try misdemeanors, or by indictment." Therefore, as the complaint in Mr. Crawford's case was filed November 1, 2000, the amended complaint was filed November 2, 2000, and the arraignment took place on November 2, 2000, there can be no doubt that "felony proceedings" against Mr. Crawford had commenced at that time and his Sixth Amendment right to counsel had attached (LF 1, 7-10). ***See State v. Meinhardt*, 900 S.W.2d 242, 246 (Mo. App., S.D.**

1995) (for purposes of Sixth Amendment analysis, felony proceedings are initiated with the filing of the complaint or indictment).

Also, **Rule 22.07** provides, in part, that a person who is arrested under a warrant for any felony shall be brought before a judge as soon as practicable and the judge "shall inform the defendant of the felony charged, his right to retain counsel, his right to request the assignment of counsel if he is unable to retain counsel." **Rule 31.02** also makes clear that the right to counsel attaches at an initial appearance:

> (a) In all criminal cases the defendant shall have the right to appear and defend in person and by counsel. If any person charged with an offense, the conviction of which would probably result in confinement, shall be without counsel ***upon his first appearance before a judge***, it shall be the duty of the court to advise him of his right to counsel, and of the willingness of the court to appoint counsel to represent him if he is unable to employ counsel…

Rule 31.02 (a) (emphasis added).[9] The first sentence of **Rule 31.02** mirrors the Missouri Constitution's right to counsel provision, **Art. I, Section 18(a)**. Clearly,

---

[9] **Rule 31.02** is substantially the same as prior **Rule 29.01(a)** except for the second sentence. Prior **Rule 29.01(a)** stated that "If any person charged with the commission of a felony appears ***upon arraignment*** without counsel… ." New **Rule 31.02**, adopted in 1979, two years after ***Brewer v. Williams***, changed "upon arraignment" to "upon his first appearance before a judge… ."

under state law, a criminal defendant must be apprised of his right to counsel at the initial appearance before a judge. Just as in ***Brewer v. Williams***, it is at this point that the right to counsel attaches.[10]

The police, in bringing Harold Anderson and Beverly Williams to a "critical stage" lineup on November 4, 2000, two days after Mr. Crawford's Sixth Amendment rights had attached, and conducting the lineup in the absence of counsel or an intelligent waiver from Mr. Crawford, violated Mr. Crawford's Sixth Amendment right to counsel. ***Gilbert v. California,* 87 S.Ct. at 1957; *Kirby v. Illinois,* 92 S.Ct. at 1879.**

The exclusionary remedy for this Sixth Amendment violation

Two types of evidence should have been excluded pursuant to this Sixth Amendment violation. First, all testimony regarding the out-of-court lineup was inadmissible *per se*.[11] Second, the actual in-court identifications of Mr. Crawford by

---

[10] See also ***McNeil v. Wisconsin,* 501 U.S. 171, 173 (1991)**, Petitioner McNeil was brought before a Milwaukee County Commissioner on an armed robbery charge. The Commissioner set bail and scheduled a preliminary examination. ***Id.*** In Wisconsin, as in Missouri, this process is called an "initial appearance." ***Id.*** Justice Scalia, writing for the Court, observed that it was "undisputed" that McNeil's Sixth Amendment right to counsel had attached and was invoked at his *initial appearance* for the offense at issue. ***Id.***

[11] Four witnesses testified to the out-of-court lineup: Harold Anderson (TR 361-364); Beverly Williams (TR 398-400); Officer Thomas Sheehan (TR 573-580); Officer Stanley Kardasz (TR 647-648, 668).

Harold and Williams were also inadmissible because the "source" of their in-court identifications was the illegal lineup itself.

Testimony regarding the out-of-court lineup

According to the United States Supreme Court, any testimony regarding the illegal lineup itself is inadmissible *per se*, because such testimony is the direct result of the illegal lineup "come at by exploitation of (the primary) illegality." ***Gilbert v. California*, 87 S.Ct. at 1957 (*quoting Wong Sun v. United States*, 371 U.S. 471, 488, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963))**. The State is therefore not entitled to an opportunity to show that that testimony had an independent source. ***Id.*** "Only a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." ***Id.***

To avoid the hazards to a fair trial which inhere in lineups, the desirability of deterring the constitutionally objectionable practice must prevail over the undesirability of excluding relevant evidence. ***Id.*** That conclusion is buttressed by the consideration that the witness' testimony of his lineup identification will enhance the impact of his in-court identification on the jury and seriously aggravate whatever derogation exists of the accused's right to a fair trial. ***Id.***

Therefore, all of the evidence regarding the out-of-court lineup should have been excluded. This evidence came in through Harold Anderson (TR 361-364); Beverly Williams (TR 398-400); Officer Thomas Sheehan (TR 573-580); and Officer Stanley Kardasz (TR 647-648, 668). Each of these witnesses testified about the lineup process,

the environment in which it occurred, the identification of Mr. Crawford by Harold and Williams, and the strength of their identifications. A new trial is required on the erroneous admission of this evidence alone.

Testimony regarding the in-court identifications

Both Harold Anderson and Beverly Williams identified Mr. Crawford at trial as the shooter (TR 363, 400). But their in-court identifications were not sufficiently purged of the primary taint from the illegal lineup such as to render them admissible. The lineup is most often used to crystallize the witnesses' identification of the defendant for future reference. ***U.S. v. Wade*, 87 S.Ct. at 1939**. This is especially true of Harold Anderson, as he was unable to identify Mr. Crawford at the roadside "show-up" only minutes after the crime (TR 22, 33, 70, 82, 294, 372, 633). Therefore, Harold's in-court identification of Mr. Crawford was *necessarily* based upon his identification at the lineup, and was not of independent origin. ***Gilbert*, 87 S.Ct. at 1956**.

Similarly, Ms. Williams' in-court identification was not based upon anything independent of the lineup. Indeed, at the roadside show-up, she could only say that she thought that one of the suspect's heads looked like the shooter's head, but she couldn't identify the face (TR 303). She picked a man by the shape of his head (TR 304). She was "pretty certain" about this man, although, she thought that the shooter had been heavier (TR 34). Only after her discussion with Officer Kardasz, about the blue shirt making the man look heavier, did Williams conclude that he could be the shooter (TR 34).

It is also critical to remember that Harold and Williams viewed the two men from 100 feet away behind the dark-tinted windows of the police car (TR 22), and that the entire shooting incident took place within a matter of seconds (TR 301-302). Under the circumstances, it was clearly the lineup, and not the show-up, that "crystallized" Harold's and Williams' identification of Mr. Crawford at trial.

The ***Wade*** Court suggested that the application of the ***Wong Sun*** rule to exclude evidence of an in-court identification requires consideration of various factors; for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. ***Id.*, 87 S.Ct. at 1940**. Applying the facts of this case, discussed above, to these ***Wade*** factors, leads to a conclusion that the in-court identifications were necessarily based upon the illegal lineup identification, and the in-court identifications should have been excluded from trial.

The illegally-obtained and erroneously-admitted identification evidence was the *crux* of the State's case. The State's closing argument focused exclusively upon the eyewitness identifications. It had to. There was no confession and no physical evidence tying Mr. Crawford to the murder weapon or the shirt that the shooter allegedly wore. It is impossible to say that the jury would have reached the same conclusion had the lineup identification evidence been properly excluded. Admitting this evidence resulted in manifest injustice.

Conclusion

Our constitution guarantees that an accused need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial. ***United States v. Wade,* 87 U.S. at 226**. There is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and the presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial. ***Id***. The presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution. ***Id.***

The trial court was presented with two key facts to alert it to the violation of Mr. Crawford's Sixth Amendment right to counsel. At the prosecutor's request, the court took judicial notice that the lineup occurred three days after the initial charges were filed and two days after Mr. Crawford's arraignment (TR 669). A police officer also told the Court that he was aware that Mr. Crawford's counsel had specifically requested to be present at the lineup, but the lineup was conducted in counsel's absence (TR 72-73). Under the facts of this case, the erroneous admission of the evidence taken pursuant to this constitutional violation rises to the level of plain error. This Court must reverse and grant Mr. Crawford a new trial.

II.

The trial court abused its discretion in overruling Mr. Crawford's motion to suppress Harold Anderson and Beverly Williams' identification of him as the shooter, and admitting these identifications at trial, because admission of these identifications violated Mr. Crawford's right to due process of law guaranteed by the 5th and 14th Amendments to the U.S. Const. and Art. I, § 10 of the Mo. Const., in that the identifications were the result of an unnecessarily suggestive police procedure which created a substantial risk of misidentification, and as the crux of the State's case rested on identification testimony alone, the admission of the evidence was not harmless.

The Due Process Clause of the Fifth and Fourteenth Amendments forbids identification procedures that are unnecessarily suggestive and conducive to irreparable mistaken identification at trial. ***Foster v. California,* 394 U.S. 440, 442, 89 S.Ct. 1127, 1128, 22 L.Ed.2d 402 (1969); *Stovall v. Denno,* 388 U.S. 293, 302, 87 S.Ct. 1967, 1972, 18 L.Ed.2d 1199 (1967); *Morris v. State*, 532 S.W.2d 455, 458 (Mo. banc 1976); *State v. Young*, 610 S.W.2d 8, 14 (Mo. App., E.D. 1980)**.

Mr. Crawford moved to suppress the identifications of him on the basis of an impermissibly suggestive police investigative procedure (LF 22-24). The trial court denied the motion after an evidentiary hearing (TR 321-322). Harold Anderson and Beverly Williams' identification of Mr. Crawford both out-of-court and in-court were admitted over Mr. Crawford's objections at trial (TR 362, 398).

Standard of Review

This court's review of a trial court's decision concerning a motion to suppress evidence "is limited to a determination of whether there is substantial evidence to support its decision." ***State v. Tackett,* 12 S.W.3d 332, 336 (Mo. App., W.D. 2000)**. The review is for an abuse of discretion. ***State v. Villa-Perez*, 835 S.W.2d 897, 902 (Mo. banc 1992)**. The decision of the trial court will be reversed only if it is clearly erroneous and this Court is "left with a definite and firm belief a mistake has been made." ***State v. Leavitt,* 993 S.W.2d 557, 560 (Mo. App., W.D. 1999)**. This Court will view all evidence and any reasonable inferences there from in the light most favorable to the ruling of the trial court. ***Tackett,* 12 S.W.3d at 336**.

The Law of Identification

"Before identification testimony is suppressed, the trial court must find that the procedure employed was so suggestive as to give rise to a very substantial likelihood of misidentification." ***Neil v. Biggers,* 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401(1972); *State v. Moore,* 726 S.W.2d 410, 412 (Mo. App., E.D. 1987)**. Reliability is the linchpin in determining the admissibility of identification testimony, and even if the identification procedure itself was suggestive, so long as the challenged identification itself is reliable, it is admissible. ***Manson v. Brathwaite,* 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977)**. In determining whether identification testimony must be excluded, the crucial test for admission of identification testimony is two pronged: 1) whether the pre-trial identification procedure was unduly suggestive, and 2) if so, what impact did the

suggestive procedure have on the reliability of the identification. ***Id***. Reliability is assessed under the totality of the circumstances, and considers many factors:

- the opportunity of the victim to view the criminal at the time of the crime
- the witness' degree of attention
- the accuracy of the witness' prior description of the criminal
- the level of certainty of identification demonstrated by the witness
- the length of time between the crime and the identification

***Id*. at 354-355**. Witness identification should be excluded when the procedure was so suggestive that there exists a great likelihood of misidentification. ***Id*. at 345**.

In ***Foster v. California,* 394 U.S. 440, 444, 89 S.Ct. 1127, 1129, 22 L.Ed.2d 402 (1969)**, a robbery case, the United States Supreme Court reversed a conviction because the identification procedure violated the accused's constitutional right to due process. At the initial lineup, the victim/eyewitness was unable to identify Foster as the robber. The accused was then placed in a room with the victim and prosecuting officials. Even then, the victim was unsure. Several days later, the accused was placed in a lineup with four other men, none of whom had been in the first lineup. This time, the victim identified the accused as the robber. The Supreme Court held that this procedure "so undermined the reliability of the eyewitness identification as to violate due process," and "made it all but inevitable that [the victim] would identify [the accused] whether or not he was in fact [the robber]." **394 U.S. at 443; 89 S.Ct. at 1129.**

The Facts applied to the Law

The pretrial identification procedures utilized by the police in Mr. Crawford's case, especially as used with Harold Anderson, are practically identical to the procedures held unconstitutional in ***Foster v. California, supra***. Harold could not identify either suspect as the shooter at the roadside show-up only minutes after the crime (TR 22, 33, 70, 82, 294, 372, 633). Ms. Williams testified that the entire incident happened in seconds, and that she saw the shooter for just seconds (TR 301-302). When Harold told the officer that he could not make an identification, he did not think the officer was very happy (TR 379). He wanted an identification (TR 372-373). Harold thought that the short, chubby one might have been the shooter, but the other guy was too thin to be the shooter (TR 292). The chubby one was Reece and the thinner one was Mr. Crawford (TR 292-293). He was not sure though who the shooter was and he did not make a positive identification (TR 293).

Williams, who was sitting right next to Harold in the police car, thought that one of the suspects' heads looked like the shooter's head, but she could not say about the face (TR 303). She picked out one man by the shape of his head (TR 304). She was "pretty certain" about this man, although, she thought that the shooter was heavier (TR 34). Officer Kardasz discussed the blue shirt with her (TR 34). After their discussion, Williams concluded that maybe the man looked heavier because he had been wearing the blue shirt over the T-shirt (TR 34).

One week after the shooting, the Prosecuting Attorney still did not think that there was enough evidence to issue charges (TR 651-652). So, on October 30, 2000, Officer

Kardasz went to talk to Harold about his statement (TR 645). Harold allegedly told Kardasz that the more he thought about the incident, the more he was sure that the man with the bald head or close haircut that he had seen down on Hall Street was the shooter (TR 645-646, 674). But it is unclear from Kardasz' testimony which man that was--Reece or Crawford (TR 645-646). Indeed, at the suppression hearing, the prosecutor showed Mr. Reece's photograph to Harold and asked him if that was the shooter; Harold looked at Reece's picture for thirty seconds and then said he was "not for sure." (TR 277-279). He then identified a picture of Mr. Crawford and said he was the shooter (TR 280).

The live lineup took place twelve days after the shooting (TR 45). Mr. Crawford was the only person in the lineup that Harold and Williams had seen before (TR 71). The police did not put the other suspect, Robert Reece, in the lineup (TR 90, 376, 414, 664). Again, Harold and Williams were not separated, but stood in the hallway together (TR 61-62). Harold agreed that he and Williams were close enough that they could touch (TR 289). Williams said that Harold was standing out of her reach, but not out of sight (TR 413).

Harold was brought to the window first (TR 289). As the men walked into the room, he said, "no, no, no, no, yes." (TR 24, 290). Officer Kardasz recalled Harold saying aloud, "no, that's not him, that's not him, that's not him" and when Mr. Crawford walked out, he said, "that's him." (TR 24, 659, 661). Harold was saying this in the presence of Williams, as she was watching him pick someone out of the lineup (TR 416, 662-663). As they left the lineup, Harold said to Williams, "it was the last guy, right?" (TR 84).

When Williams walked up to the door to look at the lineup, she recognized the bald man with the cone-shaped head (TR 399). She picked out Mr. Crawford (TR 400). Williams identified Mr. Crawford by the "shape of the head" that she had identified before (TR 306). At trial, when Williams viewed a picture of Mr. *Reece*, she also recognized "the shape of the head." (TR 304). She described Mr. Reece's head as "slightly pointed." (TR 419). Mr. Crawford and Mr. Reece are cousins and they look a lot alike (TR 369). She asked the prosecutor who it was (TR 304). She said that Mr. Reece's head is also "slightly coned," but not quite as defined as the other one (TR 313). She testified, "Please understand me. I did not see any eyes, nose or mouth. I only recognize the shape of the head." (TR 319).

The unique problem in this case is that the police failed to separate the two witnesses during the original show-up identification and the live lineup. At the show-up, Williams tentatively identified Mr. Crawford as the suspect (only after a suggestive conversation with the officer), but Harold was unable to make an initial identification. Since Harold was in the car with Williams when she made her identification, this tainted Harold's future identification at the police station lineup and at trial. Further, Mr. Crawford was the only suspect that Harold had seen before - and even then, after the lineup, he had to ask Williams, "it was the last guy, right?" Just as in ***Foster, supra***, this case "presents a compelling example of unfair lineup procedures." ***Id.*, 89 S.Ct. at 1128**.

While the use of the "show-up" procedure is accepted in Missouri, ***State v. Hoopingarner***, **845 S.W.2d 89, 93 (Mo. App., E.D. 1993)**, by the same token, the Eighth Circuit Court of Appeals has recognized that a "show-up" is the most suggestive, and

therefore the most objectionable, method of pre-trial identification. ***State v. Henderson*, 719 F.2d 934, 937 (8th Cir. 1983)**. Here, the police officer added two more layers of suggestiveness to the already inherently suggestive nature of the show-up by: 1) having Harold and Williams view the show-up together; and 2) discussing with Williams why one of the suspects on the roadside might look thinner than the shooter because the shooter had been wearing a blue shirt over his t-shirt. Indeed, this Court has noted that a show-up may be impermissibly suggestive when the identification is made as a response to suggestions or encouragement of the police. ***State v. Moore*, 726 S.W.2d at 412.** Williams' tentative identification at the show-up suffers from this taint of suggestion or encouragement by the police.

The determination of reliability is based on the totality of the circumstances. ***State v. Winston*, 959 S.W.2d 874, 979 (Mo. App., E.D. 1997)**. Here, the totality of the circumstances reveals a highly suggestive police procedure which inevitably tainted the in-court testimony of both Harold and Williams. The witnesses had barely any time to view the shooter at the time of the crime - it happened in a matter of seconds; it is not clear that they had any specific attention focused on the shooter - Harold thought the shooter's shirt was green, when it was apparently blue, and Williams did not notice the shooter's eyes, nose or mouth; Harold could not identify the shooter initially, and Williams made only a tentative identification after the police suggested to her why the shooter might have looked heavier; and the live lineup did not take place until two weeks after the crime.

Conclusion

"The reliability of properly admitted eyewitness identification, like the credibility of the other parts of the prosecution's case is a matter for the jury. But it is the teaching of ***Wade***,[12] ***Gilbert***,[13] and ***Stovall***, ***supra***, that in some cases the procedures leading to an eyewitness identification may be so defective as to make the identification constitutionally inadmissible as a matter of law. ***Foster v. California*, 89 S.Ct. at 1129.** This is such a case. As discussed in Point I, supra, the error in the admission of this tainted and unreliable testimony cannot be harmless because eyewitness testimony was the crux of the State's case. There was no confession, and no evidence linking Mr. Crawford to the murder weapon. This Court must reverse Mr. Crawford's conviction and remand for a new trial.

[12] ***U.S. v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967)**.

III.

The trial court plainly erred in failing to conduct individual questioning of the deliberating, unsequestered jurors *sua sponte*, in violation of Mr. Crawford's rights to due process and a fair trial before a fair and impartial jury as guaranteed by the 5th, 6th and 14th Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that when it came to the trial court's attention that a highly prejudicial newspaper article about Mr. Crawford's trial was published in the morning paper, after the unsequestered, but deliberating jury, had gone home for the evening, it was not enough to remind the jury that the court had previously instructed them not to look at the newspaper and then to ask one general question about whether any of them had seen the morning paper. Failure to conduct individual questioning of each juror resulted in manifest injustice if this error is left uncorrected.

The jury retired to deliberate at 3:15 p.m. on Thursday, September 26, 2002 (TR 795). At 7:00 p.m., the jury sent a note asking if they could go home (TR 800). One of the jurors was sick (TR 801). The court released the jury at 7:16 p.m. and told them to return at 9:00 the next morning (TR 802).

In the next morning's paper, the St. Louis Post-Dispatch published an article about Mr. Crawford's case (TR 802). It included information that the co-defendant Reece was tried and acquitted (TR 802). It also included information that Reece claimed that he

---

[13] ***Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967)**.

never got out of the car, did not know what happened, and drove away when Crawford jumped back in (TR 802). It continued that Mr. Crawford told Reece as they were running away that he had shot Butler (TR 802).

Pursuant to defense counsel's request, the court addressed the jury about the article (TR 802). The court first reminded the jury that it had admonished them not to read any newspaper reports about the trial; then the court asked if any of them had seen the newspaper article in the morning paper (TR 804). All of the jurors shook their heads (TR 804). Counsel failed to request further inquiry and no further inquiry was made at that time (TR 804). However, in the motion for new trial, defense counsel alleged trial court error in not questioning each juror individually as to whether they read the newspaper article (LF 60). As there was no further request at the time, however, Mr. Crawford must request plain error review pursuant to **Rule 30.20**. Due to the extremely prejudicial information contained in the article, the danger of possible exposure and the partial and possibly intimidating way in which the trial court made general inquiry into the matter, there is a great likelihood that manifest injustice has occurred.

"(T)he jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment." ***Mattox v. United States*, 146 U.S. 140, 149, 13 S.Ct. 50, 53, 36 L.Ed. 917 (1892).** "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimum standards of due process." ***In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948)**. "The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading

by jurors of news articles concerning the trial. . . . (E)ach case must turn on its own special facts." ***Marshall v. United States* , 360 U.S. 310, 312, 79 S.Ct. 1171, 1173, 3 L.Ed.2d 1250 (1959)**.

Juror misconduct concerning outside influences must be fully investigated to determine if any misconduct actually occurred and whether it was prejudicial. ***United States v. Brantley,* 733 F.2d 1429, 1439 (11th Cir. 1984)**. A court should question all jurors as to whether the communication occurred, and, if so, the court must determine whether prejudice was reasonably possible. ***Id.*** The more serious the potential jury contamination, especially where alleged extrinsic influence is involved, the heavier is the burden to investigate. ***United States v. Caldwell*, 776 F.2d 989 (11th Cir. 1985)**.

The judge should examine the jurors *individually* when it appears that issues extraneous to the case might affect the jury's impartiality. ***Com. v. Gittens*, 769 N.E.2d 777, 781 (Mass. App. Ct., 2002)**. Individual questioning would not have taken extraordinary time out of Mr. Crawford's five-day trial, and would have assured that each juror was giving an accurate recounting. *See* e.g., ***Com. v. Colon-Cruz*, 562 N.E.2d 797, 810 (Mass. 1990)** (Where media attention to the trial and conviction of codefendant in the weeks before trial increased the possibility of prejudice in the minds of the jurors, the trial judge was well aware of the potential for such prejudice among the jurors, and therefore he examined the jurors *individually*.)

Individual questioning was required here because of the possible stifling effect of the trial court's general question to the jury. Instead of simply asking whether any of them had seen the paper that morning, the trial court premised its question by reminding

the jury that it had "admonished" them "repeatedly" about not reading the newspaper (TR 803-804). It is probable that most jurors would be tentative about acknowledging a violation of the court's order, if they had, in fact, seen the paper. "Questioning should be as neutral as possible." ***United States v. Herring*, 568 F.2d 1099, 1105 (5th Cir. 1978)** (citing ABA Standards Relating to Fair Trial and Free Press §3.5(f) (1968), and reversing for failure of trial court to question jurors separately about possible prejudice from damaging publicity).

Just as in ***Herring***, the trial court here committed reversible error when it failed to examine each juror separately, in the presence of counsel, to determine (1) how much contact the juror had with the damaging publicity and (2) how much prejudice to the defendant had resulted from that contact, assuming that any had occurred. ***Id.* at 1106**. The publicity here was extremely damaging. The article not only informed that the co-defendant had been acquitted, but that the co-defendant stated that Mr. Crawford admitted to shooting Butler. There is nothing more damning than an alleged confession. ***See Arizona v. Fulminante*, 499 U.S. 279, 296, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)** ("the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him…").

The possibility for prejudice was too great to be satisfied with one general question to the jury, and the trial court's failure to adequately question the jurors individually resulted in manifest injustice. When faced with a threat of newspaper publicity infecting the integrity of the proceedings, "[t]he judge's response is to be commensurate with the severity of the threat posed." ***Patterson v. Colorado*, 205 U.S.**

454, 462, 27 S.Ct. 556, 558, 51 L.Ed. 879 (1907). The trial court's response here was not commensurate with the enormous threat to Mr. Crawford's constitutional right to a fair trial before an impartial jury. This Court must reverse his convictions and remand for a new trial.

CONCLUSION

Because Mr. Crawford was subjected to a post-charge, post-arraignment lineup in the absence of counsel, the trial court plainly erred in allowing the admission of evidence regarding the lineup and identifications based on the lineup (Point I). Further, because the roadside show-up and the subsequent lineup were tainted by suggestive practices, the trial court abused its discretion in allowing the in-court identifications that were based on these tainted procedures as they were inherently unreliable (Point II). And finally, the trial court failed to employ a sufficient procedure to insure that the deliberating jury was not tainted by a newspaper article that implicated Mr. Crawford in the crime (Point III). For all of these reasons, Mr. Crawford respectfully requests that this Court reverse his convictions and remand for a new trial.

Respectfully Submitted,

_____
Amy M. Bartholow, MOBar #47077
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3722
Phone: (573) 882-9855
Fax: (573) 875-2594
ABarthol@mspd.state.mo.us

Certificate of Compliance and Service

I, Amy M. Bartholow, hereby certify as follows:

- ✓ The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13-point font. According to MS Word, excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, this brief contains **12,969** words, which does not exceed the 31,000 words allowed for appellant's opening brief.
- ✓ The floppy disc filed with this brief contains a copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which is updated every Sunday (i.e., last updated on March 14, 2004). According to that program, the disc is virus-free.
- ✓ True and correct copies of the attached brief and floppy disc were mailed, this **18th day of March, 2004**, to Karen Kramer, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

_____

Amy M. Bartholow